IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1976

No. 76- 1690

DR. H. W. BERRY, et al.,

Appellants,

v.

J. D. DOLES, etc., et al.,

Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA

JURISDICTIONAL STATEMENT

Of Counsel:

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1976

No. 76-

DR. H.W. BERRY, M.C. BLOUNT, ISAAC J. CHUMBLY and JULIAN C. SIMMONS, individually and on behalf of all those similarly situated,

Appellants,

v.

J.D. DOLES, individually and in his capacity as Chairman of the Peach County Board of Commissioners of Roads and Revenues; H.W. PEAVY, JR. and EDWARD C. WOODWARD, individually and in their capacity as members of the Peach County Board of Commissioners of Roads and Revenues; and JULIAN F. JONES, individually and in his capacity as Judge of the Probate Court of Peach County,

Appellees.

JURISDICTIONAL STATEMENT

Appellants appeal from the order of the United States District Court for the Middle District of Georgia, entered February 28, 1977, which order by a court of three judges denied appellants' request for an injunction setting aside elections. Appellants also appeal from the order entered on April 26, 1977, refusing to reconsider or modify the initial order.

OPINIONS BELOW

The opinions of the United States District Court for the Middle District of Georgia, dated February 28, 1977, and April 26, 1977, are unreported and are appended hereto at 1a and 5a, respectively. The letter of the originating judge dated August 9, 1976, denying a pre-election hearing is appended hereto at 7a. Notices of appeal from the opinions, filed March 30, 1977 and May 25, 1977, are appended hereto at 9a and 11a, respectively.

JURISDICTION

This action was brought under the First, Thirteenth, Fourteenth and Fifteenth Amendments of the Constitution of the United States and the following provisions of the United States Code: 28 U.S.C. §§1331, 1343(3) and (4), 2201, 2281 and 2284 and 42 U.S.C. §§1973c and 1983.

Plaintiffs filed this class action on August 6, 1976, to enforce §5 of the Voting Rights Act of 1965 in the elections to be held for the members of the Peach County, Georgia, Board of Commissioners of Roads and Revenues [hereinafter Board of Commissioners].[1]

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1. Plaintiffs also sought declaratory and injunctive relief against the use of at-large elections for the Board of Commissioners. This issue is for a single judge court and is presently pending.

A statutory three-judge district court was convened after the disputed elections were held which granted prospective relief on February 28, 1977, but refused to shorten terms or set aside elections held in violation of §5.

The jurisdiction of this Court to review this decision by direct appeal is conferred by 28 U.S.C. §1253 and 42 U.S.C. §1973c. See Allen v. State Board of Elections, 393 U.S. 544 (1969).

STATUTORY PROVISIONS INVOLVED

This appeal presents a question as to the relief to be entered when a state statute was held unenforceable for non-compliance with the Voting Rights Act. The validity of the state statute is not at issue. However, for clarity, the statute Ga.L. 1968, p. 2473, §2A, and its predecessor, Ga.L. 1964, p. 2627, §1, are set out at 12a.

QUESTIONS PRESENTED

I. Whether the district court erred in refusing to shorten terms or set aside elections to remedy a patent violation of §5 of the Voting Rights Act of 1965?

II. Whether the district court erred in denying retroactive relief for a §5 violation on grounds that the change (staggering of terms) had no racially discriminatory purpose or effect without taking evidence on the issue, and contrary to allegations in the complaint?

STATEMENT OF THE CASE

This case involves the scope of relief for a violation of §5 of the Voting Rights Act of 1965. Plaintiffs sought, among other things, declaratory and injunctive relief against the holding of the August 10, 1976, primary election and the November 2, 1976, general election for the Peach County Board of Commissioners under §2A of Ga.L. 1968, p. 2473. The grounds for injunctive relief were that §2A of Ga.L. 1968, p. 2473, which staggered the terms of office for the Board of Commissioners constituted a change in voting standards, practices and procedures for which no judicial or administrative approval had been obtained as required by 42 U.S.C. §1973c.

In a letter to counsel dated August 9, 1976, the originating judge refused to set plaintiffs' motion for preliminary injunction down for hearing because he "seriously question[ed] that there is any possibility that the 1968 law which merely staggered the terms of the Peach County Commissioners is argueably a change encompassed by the Voting Rights Act." 7a. In their answer, defendants denied that the 1968 law constituted a change under the Voting Rights Act of 1965, but admitted that there had been no compliance with §5 procedures (defendants' answer, ¶10).

The August 10, 1976, primary elections were held utilizing the staggered terms provision, after which plaintiffs renewed their motion for injunctive relief requesting that the results be set aside and that new elections be held without regard to the 1968 law or under the 1968 law after pre-clearance was obtained. (Renewal of motion for injunctive relief and supplemental memorandum in support of motion for injunctive relief, p. 6.) The court failed to act upon the renewal of the motion and the November 2, 1976, general elections were held, once again utilizing the staggered terms provision.

On February 2, 1977, defendants filed a brief conceding for the first time that the staggering of terms was a change covered by §1973c requiring judicial or administrative approval prior to use. However, defendants argued that the setting aside of the 1976 election results was not required and that a prospective injunction against future elections under §2A of Ga.L. 1968, p. 2473, was the appropriate relief. On February 28, 1977, a three-judge court enjoined the prospective enforcement of the 1968 law but refused to set aside the 1976 election results. Without an evidentiary hearing on the issue, the court reasoned that there was an apparent lack of discriminatory purpose or effect in the use of the 1968 law and relying on Allen v. State Board of Elections, 393 U.S. 544, 572 (1969), refused to grant retroactive relief. 2a - 4a.

On March 23, 1977, plaintiffs moved pursuant to Rule 60(b)(6), F.R.Civ.P. for reconsideration or modification of the district court's February 28 order.[1] The motion was denied on the grounds that the court was without jurisdiction because of the pending appeal to this Court and there was no reason for reconsideration. 5a.

1. In the event that the court declined to set aside the elections, plaintiffs requested that it modify its order to require that defendants obtain preclearance under §1973c for the 1968 law thirty days prior to the final qualifying date for candidates in the 1978 election. Further, if defendants were unsuccessful in obtaining preclearance that all three Board of Commissioner posts be open in the 1978 election. Such an order would insure the unstaggering of the terms within a reasonable period of time and not on the eve of the 1978 election.

THE QUESTIONS ARE SUBSTANTIAL

I. The lower court misapplied applicable decisions of this Court.

The district court relied upon Allen v. State Board of Elections, 393 U.S. 544 (1969) in refusing to shorten terms or set aside elections held in violation of §5 of the Voting Rights Act of 1965. Allen was the first case in which this Court construed authoritatively the scope of coverage of §5. Allen held that any change in voting standards, practices or procedures is within the reach of §1973c. Also see, Perkins v. Matthews, 400 U.S. 379 (1971). But because the elections challenged in Allen were held in 1966 on the heels of passage of the Voting Rights Act, and at a time when no decision existed authoritatively delimiting §5, this Court refused to grant retroactive relief. Noting that "[t]hese §5 coverage questions involve complex issues of first impression", Allen v. State Board, supra, 393 U.S. at 572, the Court declined to set aside in 1969 the elections held in 1966. The circumstances in this case, however, manifestly are different from those in Allen.

The elections challenged here were held over seven years after the authoritative construction in Allen that any change in voting laws requires preclearance. The coverage of §1973c was certainly no longer an issue of first impression at the time of the 1976 elections in Peach County. The district court's reliance upon Allen to deny relief to appellants is misplaced.

In Perkins v. Matthews, supra, the Court stated that upon a finding of a §5 violation, the question of appropriate post-election relief is for the district court to decide. Factors to be considered include the nature of the change and whether it was reasonably clear at the time of the election the change was covered by §1973c, id. 400 U.S. at 396. The change in this case, the staggering of terms, unquestionably has a substantial impact on elections.[1] Secondly, even if appellees were unaware of Allen and Perkins prior to the 1976 primary election, they cannot claim that it was unclear whether the change was covered by §1973c at the time of the November, 1976, general election. See supplemental memorandum in support of injunctive relief and attachments 1 through 5 filed September 1, 1976, documents which unquestionably demonstrated that the Attorney General of the United States viewed the staggering of terms a change within the provisions of §5.

1. The staggering of terms has an obvious potential for diluting minority voting strength in jurisdictions such as Peach County which have a history of discrimination in registration and voting and in which race remains a dominant factor in the electoral process. In such jurisdictions white voters might be more likely to vote for a black candidate if he or she is one of three chandidates than if the black candidate is running for the only position open.

The equitable considerations discussed in Perkins favor the appellants. The lower court misapplied Allen and abused its discretion in refusing to shorten terms or set aside the 1976 elections.[1]

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1. Had the originating judge correctly analyzed the applicable law, he would have been obliged to enjoin the use of the unapproved election law change. See, Georgia v. United States, 411 U.S. 526, 541 (1973). To deny retroactive relief on the basis that the appropriate post-election relief is within the discretionary power of the district court would deny appellants a remedy solely because the lower court erred. Such a result is arbitrary and inequitable.

II. This case involves important issues concerning the scope of remedy for violations of §5 of the Voting Rights Act of 1965, and implementation of congressional and constitutional policy in favor of equal access to the political process.

The lower court's refusal to shorten terms or set aside elections defeats the purpose of §5, particularly in a case such as this where the failure to comply with §5 was patent. Section 5 "automatically suspends the operation of voting regulations enacted after November 1, 1964." South Carolina v. Katzenbach, 383 U.S. 301, 335 (1966), and is to be given "the broadest possible scope." Allen v. State Board of Elections, 393 U.S. 544, 567 (1969). But here, the "suspended regulation" was not only implemented but the court refused to undo the harm done by the §5 violation. To that extent the court undermined the constitution and congressional purpose in enacting the Voting Rights Act of 1965.

Not only does "[f]ailure of the affected governments to comply with the statutory requirement ... nullify the entire [§5] scheme." Perkins v. Matthews, 400 U.S. 379, 396 (1971), but condoning such failures actually encourages §5 violations. Officials who wish to change their voting procedures but do not wish to comply with §1973c will be advised not to seek preclearance in hopes that no one will demand submission. If,

however, the change is challenged prior to an election, the officials, upon the logic of the decision of the lower court in this case, may continue to hold elections under the change until enjoined from doing so. Even if prospective relief is granted, the results of elections held under unenforceable voting laws may be retained. Recalcitrant officials have everything to gain and nothing to lose by failing to comply with §1973c. The failure of the lower court to grant proper relief in this case cannot be squared with congressional purpose in enacting the Voting Rights Act of 1965.

III. This Court should give plenary consideration to the jurisdiction of a court of three judges which has determined that a violation of the Voting Rights Act has occurred to consider racial discrimination, or lack thereof, in fashioning relief.

Appellants alleged that the staggering of terms denied their rights guaranteed by §1973c and the Thirteenth, Fourteenth and Fifteenth Amendments. No opportunity to introduce evidence on this allegations was allowed, but the district court relied on the lack of evidence to deny retroactive relief. 2a-4a.

This Court has repeatedly held that the authority of a local district court in a §5 action is limited to determining whether a voting requirement is covered by the Act, Allen v. State Board of Elections, supra, 393 U.S. at 570; Perkins v. Matthews, supra, 400 U.S. at 385; United States v. Board of Supervisors of Warren County, ___ U.S. ___, 97 S.Ct. 833, 835 (1977), and that it may not decide whether a statute violated the Fifteenth Amendment in its decision on the existence of a §5 violation. This Court in Allen did rely on the fact that no court had determined the discriminatory purpose or effect of the challenged statutes in limiting its relief to prospective application. But it is clear that district courts are not limited to freezing the status quo at the time of their orders, but may grant what is in

effect retroactive relief. United States v. County Commission of Hale County, Alabama, 425 F.Supp. 433 (S.D. Ala. 1976)(three-judge court), aff'd., ___ U.S. ___, 97 S.Ct. 1540 (1977).

If racially discriminatory purpose or effect is a relevant and legitimate issue in extending or limiting relief, this Court should consider whether plaintiffs seeking to enforce §5 are entitled to prove their claim that it exists.

IV. The district court abused its discretion in denying appellants' motion to shorten the terms of the two commissioners elected in 1976.

Under the statute held to be unenforceable by the district court, two members of the board of commissioners were elected in 1976 and one is to be elected in 1978. The prior statute would have required that all three members be elected in 1976. The two elected in 1976 are to serve until January 1, 1981.

In its February 28th order, the district court did not address the issue of which posts will be elected in 1978.[1] Appellants moved, in their March 23, 1977, motion for reconsideration to have all three posts filled in the 1978 elections if preclearance under §5 was not forthcoming, rather than the one post currently scheduled. Granting of this motion would have insured the unstaggering of terms required by the district court's order within two years rather than four. In denying the

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1. It is not at all clear that the commissioner elected in 1974 will be required to stand for election in 1978 or whether he will be allowed to serve until his successor is qualified under the 1964 statute. If the latter, he will have his term extended to six years.

motion in its order of April 26, 1977, the district court allows the appellees to have the benefits of their violation of the Voting Rights Act from 1968 until the elections in 1980. This Court should consider whether the delaying of relief for an additional two years constitutes an abuse of discretion. Compare, United States v. County Commission of Hale County, Alabama, 425 F.Supp. 433, 436-37 (S.D. Ala. 1976)(three-judge court), aff'd., ___ U.S. ___, 97 S.Ct. 1540 (1977).

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

Of Counsel:
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New York, NY

Laughlin McDonald
Neil Bradley
Christopher Coates
Atlanta, Georgia

Attorneys for Appellants

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

DR. H.W. BERRY, ET AL.,	:	[Filed Feb 28, 1977]
Plaintiffs,	:	
-v-	:	CIVIL ACTION NO. 76-139-MAC
J.D. DOLES, Individually and in his capacity as Chairman of the Peach County Board of Commissioners of Roads and Revenues, et al.,	:	
Defendants.	:	

Before HILL, Circuit Judge; BOOTLE, Senior District Judge; and OWENS, District Judge.

OWENS, District Judge:

It appearing that no factual issues essential to determination of the issues properly before this three-judge court are in dispute, and the court having carefully read and considered the facts of this case and the legal arguments of the parties with respect to the issues,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the defendants, their officers, agents, servants, employees, and attorneys, and all persons in active concert with them who receive actual notice of this order by personal service or otherwise, are hereby enjoined from further using and enforcing in any respect so much of [1968] Ga. Laws 2627, et seq., which relates to the election of the Peach County Board of Commissioners unless and until the provisions of section five of the Voting Rights Act of 1965, as amended, 42 U.S.C.A. § 1973c, have been complied with. This injunction shall continue until those requirements have been complied with and shall not otherwise be dissolved.

The plaintiffs have requested that this court set aside elections held in 1976 pursuant to the subject 1968 law and order new ones. Given the rather technical changes

made in the county's election law by the 1968 amendment and, more important, the apparent lack of any discriminatory purpose or effect surrounding the use of the law in the 1976 elections, the court denies this request and will give this order only prospective relief. As stated in Allen v. State Board of Elections, 393 U.S. 544, 571-72, 89 S.Ct. 817, 22 L. Ed 2d 1, 20-21 (1969), with respect to laws of considerably greater impact on voting rights passed at about the same time as the law in question here:

> "We decline to take corrective action of such consequence [setting aside elections], however. These § 5 questions involve complex issues of first impression -- issues subject to rational disagreement. The state enactments were not so clearly subject to § 5 that the appellees' failure to submit them for approval constituted deliberate defiance of the Act. Moreover, the discriminatory purpose or effect of

these statutes, if any, has not been determined by any court. We give only prospective effect to our decision...."

This three-judge court, having finally resolved the issues properly before it, does hereby dissolve itself and remand the case to the originating judge for such other and further proceedings consistent with this opinion as may be required.

SO ORDERED, this the 17 day of February, 1977.

s/ James C. Hill
James C. Hill
United States Circuit Judge

s/ W.A. Bootle
W.A. Bootle
Senior United States District Judge

s/ Wilbur D. Owens, Jr.
Wilbur D. Owens, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

[Filed April 26, 1977]

DR. H.W. BERRY, et al.,	:	
	:	
Plaintiffs,	:	CIVIL ACTION
	:	NO. 76-139-MAC
v.	:	
	:	
J.D. DOLES, Individually and in his capacity as Chairman of the Peach County Board of Commissioners of Roads and Revenues, et al.,	:	
	:	
Defendants.	:	

Before HILL, Circuit Judge; BOOTLE, Senior District Judge; and OWENS, District Judge.

OWENS, District Judge:

This case having been appealed to the United States Supreme Court, this court is without jurisdiction to consider the plaintiff's motion for reconsideration and, in any event, sees no reason for doing so.

The problem of relief is a question for a single-judge court.

SO ORDERED, this 26th day of April, 1977.

s/ James C. Hill
James C. Hill
United States Circuit Judge

s/ W.A. Bootle
W.A. Bootle
Senior United States District Judge

s/ Wilbur D. Owens, Jr.
Wilbur D. Owens, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
Middle District of Georgia
Macon, Georgia 31202

August 9, 1976

Mr. Laughlin McDonald
52 Fairlie Street, N.W.
Atlanta, Georgia 30303

Dear Mr. McDonald:

On August 6 you filed a complaint in behalf of Dr. H. W. Berry and others against J. G. Doles and others, individually and as members of the Peach County Board of Commissioners. In connection with that complaint you have moved for a preliminary injunction.

I have read your complaint, your motion and your brief. I seriously question that there is any possibility that the 1968 law which merely staggered the terms of the Peach County Commissioners is arguably a change encompassed by the Voting Rights Act. Until such time as you can demonstrate by brief that it is a question that is encompassed by the Voting Rights Act, I will refrain from setting your motion down for a hearing.

I assume you have made arrangements for your complaint to be served. At such time as it has been served and responsive pleadings have been filed, the court will consider

your motion for a preliminary injunction and for the creation of a three judge court on briefs and affidavits in the usual fashion.

Very truly yours,

s/ Wilbur D. Owens, Jr.
United States Judge

cc: Mr. Sampson M. Culpepper

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

[Filed Mar. 30, 1977]

DR. H.W. BERRY, et al.,

Plaintiffs,

V.

Civil Action
No. 76-139-Mac

J.D. DOLES, et al.,

Defendants.

MOTION OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Plaintiffs herein appeal to the Supreme Court of the United States from the order entered in this action on February 28, 1977 which order denied the Plaintiffs an injunction setting aside elections.

This appeal is taken pursuant to 28 U.S.C. Section 1253.

Respectfully submitted

Laughlin McDonald

s/ Neil Bradley
Neil Bradley
52 Fairlee Street, N.W.
Atlanta, Georgia 30303

s/ M. Linda Mabry
M. Linda Mabry
504 American Federal Bldg.
Macon, Georgia 31201
Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

DR. H.W. BERRY, et al., Plaintiffs,	)	[Filed May 25, 1977]
v.	)	Civil Action No. 76-139-MAC
J.D. DOLES, etc., et al., Defendants.	)	

NOTICE OF APPEAL TO
THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that plaintiffs herein appeal to the Supreme Court of the United States from the order entered in this action on April 26, 1977, which order denied plaintiffs' motion for reconsideration of the court's order of February 28, 1977.

This appeal is taken pursuant to 28 U.S.C. §1253.

Respectfully submitted,

s/ Laughlin McDonald
Laughlin McDonald
Neil Bradley
52 Fairlie Street, NW
Atlanta, Georgia 30303
Counsel for Plaintiffs

Ga.L. 1968, p. 2473

Section 2A. At the general election conducted in 1968, that candidate elected to post No. 3 (county at large) to take office on January 1, 1969, shall be elected for a two-year term of office instead of a four-year term. He shall serve until December 31, 1970. In the general election of 1970, his successor shall be elected to a four-year term of office and every four years thereafter a successor shall be elected in the general election in which the respective term of office shall expire to serve for a four-year term of office.

Ga.L. 1964, p. 2627

Section 1. There is hereby created a board of commissioners of roads and revenues for Peach County to be composed of three (3) members. One member shall be a resident of the City of Fort Valley, one member shall be a resident of Peach County outside the City of Fort Valley, and one member shall be from the county at large. The aforesaid offices shall be designated as posts numbers 1, 2 and 3, respectively. The members shall be elected by the voters of the entire county.